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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 147

[CMS-9931-NC]

Coverage for Contraceptive Services

ACTION: Request for information

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

SUMMARY: This document is a request for information on whether there are alternative ways (other than those offered in current regulations) for eligible organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still ensuring that women enrolled in the organizations' health plans have access to seamless coverage of the full range of Food and Drug Administration-approved contraceptives without cost sharing. This information is being solicited in light of the Supreme Court's opinion in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). The Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the Departments) invite public comments via this request for information.

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DATES: Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: In commenting, please refer to file code CMS-9931-NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the “Submit a comment” instructions.
2. By regular mail. You may mail written comments to the following address ONLY:
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9931-NC,
P.O. Box 8010,
Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY:
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9931-NC,
Mail Stop C4-26-05,
7500 Security Boulevard,

CMS-9931-NC

Baltimore, MD 21244-1850.

4. By hand or courier. Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC--

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Room 445-G, Hubert H. Humphrey Building,
200 Independence Avenue, SW.,
Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD--

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
7500 Security Boulevard,
Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786-9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

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For information on viewing public comments, see the beginning of the SUPPLEMENTARY INFORMATION section.

FOR FURTHER INFORMATION CONTACT:

David Mlawsky, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at (410) 786-1565.

Elizabeth Schumacher or Suzanne Adelman, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335.

Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 317-6846.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's Web site (<http://www.dol.gov/ebsa>). In addition, information from HHS on private health insurance for consumers can be found on the CMS Web site (www.cciio.cms.gov), and information on health reform can be found at <http://www.HealthCare.gov>.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the

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headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) was enacted on March 30, 2010. These statutes are collectively known as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make those provisions applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The sections of the PHS Act incorporated into ERISA and the Code are sections 2701 through 2728.

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA and the Code, requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage of certain specified preventive services without cost sharing. These preventive services include preventive care and screenings for women provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA). On August 1, 2011, the Departments amended regulations to cover women's preventive services provided for in

HRSA guidelines,¹ and HRSA adopted and released such guidelines, which were based on recommendations of the independent organization, the National Academy of Medicine (formerly Institute of Medicine). The preventive services identified in the HRSA guidelines include all Food and Drug Administration (FDA)-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider (collectively, contraceptive services).²

The Departments issued regulations that provide an accommodation for eligible organizations that object on religious grounds to providing coverage for contraceptive services.³ Under the accommodation, an eligible organization does not have to contract, arrange, pay, or provide a referral for contraceptive coverage. At the same time, the accommodation generally ensures that women enrolled in the health plan established by the eligible organization, like women enrolled in health plans maintained by other employers, receive contraceptive coverage seamlessly—that is, through the same issuers or third party administrators that provide or administer the rest of their health coverage, and without financial, logistical, or administrative obstacles.⁴ Minimizing such obstacles is essential to achieving the purpose of the Affordable Care Act’s preventive services provision, which seeks to remove barriers to the use of preventive services and to ensure that women receive full and equal health coverage appropriate to their medical needs.

Under the Departments’ regulations, an eligible organization may invoke the

¹ 26 CFR 54.9815-2713, 29 CFR 2590.715-2713, 45 CFR 147.130.

² The HRSA guidelines exclude services relating to a man’s reproductive capacity, such as vasectomies and condoms.

³ 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, 45 CFR 147.131.

⁴ An accommodation is also available with respect to student health insurance coverage arranged by eligible organizations that are institutions of higher education. 45 CFR 147.131(f). For ease of use, this RFI refers only to “employers” with religious objections to the contraceptive-coverage requirement, but references to employers with respect to insured group health plans should also be considered to include institutions of higher education that are eligible organizations with respect to student health insurance coverage.

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accommodation by self-certifying its eligibility using a form provided by the Department of Labor, EBSA Form 700, and providing the form to its health insurance issuer (to the extent it has an insured plan) or third party administrator (to the extent it has a self-insured plan).⁵

Alternatively, instead of sending the self-certification form to its issuer or third party administrator, the regulations allow an eligible organization to invoke the accommodation by providing certain information to HHS, without using any particular form.⁶

In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the Supreme Court considered claims by a number of employers that, even with the accommodation provided in the regulations, the contraceptive-coverage requirement violates the Religious Freedom Restoration Act of 1993 (RFRA). Following oral argument, the Court requested supplemental briefing from the parties. The Court's order noted that under the existing regulations, an objecting employer with an insured plan that seeks to invoke the accommodation by contacting its issuer must use a form of notice provided by the government.⁷ The Court directed the parties to file supplemental briefs addressing "whether contraceptive coverage could be provided to [the objecting employers'] employees, through [the employers'] insurance companies, without any such notice."⁸ After consideration of the supplemental briefing, the Supreme Court vacated the judgments of the courts below and remanded *Zubik* and several other cases raising parallel RFRA challenges to the accommodation. 136 S. Ct. at 1560-1561. The Court emphasized that it "expresse[d] no view on the merits of the cases" and, in particular, that it did not "decide whether [the employers'] religious exercise has been substantially burdened, whether the Government has a

⁵ The EBSA form 700 is available at:

<https://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf>

⁶ A model notice to HHS that eligible organizations may, but are not required to, use is available at:

<http://www.cms.gov/ccio/resources/Regulations-and-Guidance/index.html#Prevention>.

⁷ *Zubik v. Burwell*, Nos. 14-1418 et al., 2016 WL 1203818, at *2 (Mar. 29, 2016).

⁸ *Id.*

compelling interest, or whether the current regulations are the least restrictive means of serving that interest.” *Id.* at 1560. The Court, however, stated that in light of what it viewed as “the substantial clarification and refinement in the positions of the parties” in their supplemental briefs, the parties “should be afforded an opportunity to arrive at an approach going forward that accommodates [the objecting employers’] religious exercise while at the same time ensuring that women covered by [the employers’] health plans ‘receive full and equal health coverage, including contraceptive coverage.’” *Id.* (citation omitted).

As the government explained in its briefs in *Zubik*, the Departments continue to believe that the existing accommodation regulations are consistent with RFRA for two independent reasons. First, as eight of the nine courts of appeals to consider the issue have held, the accommodation does not substantially burden objecting employers’ exercise of religion. Second, as some of those courts have also held, the accommodation is the least restrictive means of furthering the government’s compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage. Nevertheless, the Departments also are committed to respecting the beliefs of religious employers that object to providing contraceptive coverage, and the Departments have consistently sought to accommodate religious objections to the contraceptive-coverage requirement even where not required to do so by RFRA. Consistent with that approach, the Departments are issuing this Request for Information (RFI) to determine, as contemplated by the Supreme Court’s opinion in *Zubik*, whether modifications to the existing accommodation procedure could resolve the objections asserted by the plaintiffs in the pending RFRA cases while still ensuring that the affected women seamlessly receive full and equal health coverage, including contraceptive coverage.

The Departments are using the RFI procedure because the issues addressed in the supplemental briefing in *Zubik* affect a wide variety of stakeholders, including many who are not parties to the cases that were before the Supreme Court. Other employers also have brought RFRA challenges to the accommodation, and their views may differ from the views held by the employers in *Zubik* and the consolidated cases. In addition, any change to the accommodation could have implications for the rights and obligations of issuers, third party administrators, and women enrolled in health plans established by objecting employers. RFIs are commonly used to solicit public comments on potential rulemaking in a transparent and open way. Information gathered through this RFI will be used to determine whether changes to the current regulations should be made and, if so, to inform the nature of those changes. The Departments welcome comments from all stakeholders. A principal purpose of this RFI is to determine whether there are modifications to the accommodation that would be available under current law and that could resolve the RFRA claims raised by organizations that object to the existing accommodation on religious grounds. The Departments invite all such organizations to submit comments, and request that their submissions include specific responses to the questions posed below.⁹

⁹ Consistent with the Supreme Court's decision in *Zubik*, the Departments seek to determine whether changes to the existing accommodation could resolve the pending RFRA claims brought by objecting employers. The Supreme Court separately specified that, while the RFRA litigation remains pending, "the Government may not impose taxes or penalties on [the plaintiffs] for failure to provide the ... notice" required under the existing accommodation regulations. *Zubik*, 136 S. Ct. at 1561. At the same time, the Court also emphasized that "[n]othing in [its] opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by [plaintiffs'] health plans 'obtain, without cost, the full range of FDA approved contraceptives.'" *Id.* at 1560-1561 (quoting *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014)). As such, those interim matters are not within the scope of this RFI.

II. Solicitation of Comments

A. Notification to Issuers Without Self-Certification

In its request for supplemental briefing in *Zubik*, the Supreme Court asked the parties to address whether and how “contraceptive coverage may be obtained by [objecting employers’] employees through [the employers’] insurance companies, but in a way that does not require any involvement of [the employers] beyond their own decision to provide health insurance without contraceptive coverage to their employees.”¹⁰ In particular, the Court posited “a situation in which [objecting employers] would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds. [The employers] would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal government, or to their employees. At the same time, [the employers’] insurance compan[ies]—aware that [the employers] are not providing certain contraceptive coverage on religious grounds—would separately notify [the employers’] employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by [the employers] and is not provided through [the employers’] health plan[s].”¹¹

In response, the government explained:

For employers with insured plans, the Court described an arrangement very similar to the existing accommodation. The accommodation already relieves [employers with religious objections] of any obligation to provide contraceptive coverage and instead requires insurers to provide coverage separately. The only difference is the way the accommodation is invoked. Currently, an employer that

¹⁰ *Zubik*, 2016 WL 1203818, at *2.

¹¹ *Id.*

chooses to opt out by notifying its insurer (rather than HHS) must use a written form self-certifying its religious objection and eligibility for the accommodation. The Court's order posited an alternative procedure in which the employer could opt out by asking an insurer for a policy that excluded contraceptives to which it objects. That request would not need to take any particular form, but the employer and the insurer would be in the same position as after a self-certification: The employer's obligation to provide contraceptive coverage would be extinguished, and the insurer would instead be required to provide the coverage separately." Gov't Supp. Brief 2 (citation omitted); see *id.* at 3-7.¹²

The government explained that because "[i]nsurers have an independent statutory obligation to provide contraceptive coverage," "the accommodation for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage." *Id.* at 14-15. The government also noted, however, that the current requirement of a written self-certification plays an important role in effectuating the accommodation, and therefore cautioned that such a modification could "impose real costs on the parties whose rights and duties are affected—including objecting employers." *Id.* at 14; see *id.* at 8-11 (describing the function of the self-certification requirement).

The Departments seek comments from all interested stakeholders, including all objecting employers, on the procedure for invoking the accommodation described above, including with respect to the following:

1. The Departments ask objecting organizations with insured plans to indicate whether the alternative procedure described above would resolve their RFRA objections to the accommodation. If it would not resolve a particular organization's RFRA objection, the Departments ask the organization to indicate whether its RFRA objection could be resolved by any procedure(s) or system(s) in which the organization's issuer provides contraceptive coverage

¹² The government's supplemental brief is available at <https://www.justice.gov/osg/brief/zubik-v-burwell-0>. The government's supplemental reply brief is available at <https://www.justice.gov/osg/brief/zubik-v-burwell-1>.

to the women enrolled in the organization's health plan, and, if so, describe the procedure(s) or system(s) with specificity.

2. The Supreme Court's supplemental briefing order appears to contemplate that, in requesting insurance coverage that excludes contraceptive coverage, an employer would inform its issuer that it objects to providing contraceptive coverage "on religious grounds."¹³ The Departments ask objecting organizations to indicate whether they would have any RFRA objection to informing their issuers that they object to providing contraceptive coverage "on religious grounds," or to a further requirement that the request by an eligible organization¹⁴ to its issuer be made in writing, or to a further requirement that the request be made via a particular form.

3. The government's supplemental brief explained that eliminating the written notification requirement in the existing accommodation could impose additional burdens on objecting employers, issuers, and regulators. Gov't Supp. Br. 8-10, 14-15. The Departments seek comment on the extent of those burdens and what steps could be taken to mitigate them. The Departments ask health insurance issuers, as well as other commenters, to indicate whether it is feasible for issuers to implement the accommodation without the written notification requirement.

4. What impact would the alternative procedure described above have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services?

¹³ *Zubik*, 2016 WL 1203818, at *2.

¹⁴ An eligible organization, which may seek the accommodation based on its sincerely held religious objection to providing contraceptive coverage, is defined at 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a), and 45 CFR 147.131(b),

B. Other Approaches With Respect to Insured Plans Described in the Supplemental Briefing

In their supplemental brief, the plaintiffs in *Zubik* and the consolidated cases proposed additional modifications to the existing accommodation for insured plans, beyond those described in the Supreme Court's supplemental briefing order and discussed above. As in the alternative described above, the *Zubik* plaintiffs proposed that when an eligible employer with an insured plan requests insurance coverage that excludes contraceptive coverage to which the employer objects on religious grounds, the employer's issuer should be required to provide the required coverage separately. However, the *Zubik* plaintiffs further proposed that the separate coverage provided by the issuer should differ from the separate coverage required under the existing accommodation in two respects. First, the *Zubik* plaintiffs proposed that the issuer be required to offer women the opportunity to enroll in contraceptive-only insurance policies, rather than the issuer providing separate direct payments for contraceptive services. Second, the *Zubik* plaintiffs proposed that the affected women should be required to take affirmative steps to enroll in those contraceptive-only policies, rather than being automatically eligible for payments by the issuer for contraceptive services. Pet. Supp. Br. 3-12.¹⁵

The Departments seek comments on this approach, including with respect to the following:

1. The Departments ask objecting organizations with insured plans to indicate whether this alternative procedure would resolve their RFRA objections to the accommodation.

¹⁵ Petitioners' supplemental brief is available at <http://www.scotusblog.com/wp-content/uploads/2016/04/Non-profits-response-to-Zubik-order-4-12-16.pdf>. Petitioners' supplemental reply brief is available at <http://www.scotusblog.com/wp-content/uploads/2016/04/Zubik-order-non-profits-reply-brief-4-20-161.pdf>.

2. What impact would this approach have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services?

3. Is this approach feasible for health insurance issuers?

4. Relying on the record developed in the prior rulemaking proceedings, the government's supplemental reply brief in *Zubik* explained that contraceptive-only insurance policies would be inconsistent with state laws regulating insurance and that an affirmative enrollment requirement would impose a barrier to access to preventive services. Gov't Supp. Reply Br. 3-6. The Departments seek further comment on those issues in this RFI.

5. Are there alternative procedure(s) or systems (without relying on contraceptive-only policies or imposing an affirmative enrollment requirement) that would resolve objecting organizations' RFRA objection to the accommodation? If so, please describe the procedure(s) or system(s) with specificity.

C. Self-Insured Plans

The Supreme Court's supplemental briefing order in *Zubik* addressed only employers with "insured plans."¹⁶ In its supplemental brief, the government described the operation of the accommodation for self-insured plans and explained that an alternative process like the one the Court posited for insured plans could not work for the many employers with self-insured plans:

If an employer has a self-insured plan, the statutory obligation to provide contraceptive coverage falls only on the plan—there is no insurer with a preexisting duty to provide coverage. Accordingly, to relieve self-insured employers of any obligation to provide contraceptive coverage while still ensuring that the affected women receive coverage without the employer's involvement, the accommodation establishes a mechanism for the government to designate the employer's TPA as a 'plan administrator' responsible for separately providing the required coverage under [ERISA]. That designation is made by the government,

¹⁶ *Zubik*, 2016 WL 1203818, at *2.

not the employer, and the employer does not fund, control, or have any other involvement with the separate portion of the ERISA plan administered by the TPA.

The government's designation of the TPA must be reflected in a written plan instrument. To satisfy that requirement, the accommodation relies on either (1) a written designation sent by the government to the TPA, which requires the government to know the TPA's identity, or (2) the self-certification form, which the regulations treat as a plan instrument in which the government designates the TPA as a plan administrator. There is no mechanism for requiring TPAs to provide separate contraceptive coverage without a plan instrument; self-insured employers could not opt out of the contraceptive-coverage requirement by simply informing their TPAs that they do not want to provide coverage for contraceptives. Gov't Supp. Br. 16-17 (citations omitted).

The *Zubik* plaintiffs also stated that an arrangement like the one posited in the Supreme Court's briefing order for insured plans could not work for self-insured plans. See Pet. Supp. Br. 16-17.

Although the Departments have not identified any viable alternative to the existing accommodation for self-insured plans, they seek comment on any possible modifications to the accommodation for self-insured plans, including self-insured church plans that would resolve objecting organizations' RFRA objections while still providing seamless access to coverage, including with respect to the following:

1. Are any reasonable alternative means available under existing law by which the Departments could ensure that women enrolled in self-insured plans maintained by objecting employers receive separate contraceptive coverage that is not contracted, arranged, paid, or referred for by the objecting organization but that is provided through the same third party administrators that administer the rest of their health benefits?

2. The Departments ask objecting organizations with self-insured plans to indicate whether their RFRA objections to the existing accommodation could be resolved by any alternative procedure or system in which the objecting organization's third party administrator

provides contraceptive coverage to the women enrolled in the organization's health plan, and, if so, to describe the procedure(s) or system(s) with specificity.

III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Victoria A. Judson,

Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service, Department of the Treasury.

Signed at Washington, DC, this 18th day of July, 2016.

Robert J. Neis,

Benefits Tax Counsel, Department of the Treasury.

Signed this 18th day of July, 2016.

Signed this 18th day of July, 2016.

Phyllis C. Borzi,

Assistant Secretary,

Employee Benefits Security Administration

Department of Labor

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Dated: July 14, 2016

Andrew M. Slavitt,
Acting Administrator,
Centers for Medicare & Medicaid Services.

Approved: July 15, 2016

Sylvia M. Burwell,
Secretary,
Department of Health and Human Services.

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